IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEREMY LOERCH, Respondent, v. ERIC E. MILLER and JANE DOE MILLER and the marital community composed thereof; ROBERT W. MILLER and MARY ROE MILLER and the marital community composed thereof, Appellants.	)	NO. 61301-4-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2009

Leach, J. — Eric Miller appeals from a judgment in favor of Jeremy Loerch for damages caused by a collision between a motorcycle operated by Loerch and a car driven by Miller. Miller contends that the trial court erred in restricting expert testimony to modifications of Loerch's motorcycle that were illegal and contributed to the collision. Miller also contends that the court erred in admitting testimony and instructing the jury regarding Miller's duty to stop and render aid to Loerch following the collision. Because the excluded expert testimony relates only to Loerch's attempt to evade the collision, which, in this case, cannot establish contributory negligence, the trial court properly barred expert testimony

regarding modifications to Loerch's motorcycle that contributed to the collision. The court also did not err in allowing the hit-and-run testimony and instruction because Miller disputed the extent of Loerch's emotional injuries allegedly resulting from his failure to stop and render aid and because Miller only admitted his failure to yield the right-of-way. We affirm judgment for Loerch.

Background

On the evening of July 15, 2005, Loerch rode his 1977 Harley Davidson southeast on Belmont Avenue East. Proceeding up the hill, Loerch prepared to round the corner so he downshifted and reduced his speed. Loerch testified at trial that he was traveling at a speed below 25 m.p.h. As Loerch crested the hill and entered the intersection of Belmont Avenue East and East Roy Street, a red 1992 BMW driven by Miller pulled out in front of him. Miller had entered the intersection intending to turn left onto Belmont Avenue in the direction from which Loerch had come. Miller testified that he had come to a full stop at the sign before entering the intersection, but Loerch asserted that Miller made a "rolling" stop.

Loerch attempted to avoid the collision by braking and laying the motorcycle on the ground. Although he was coming to a stop "pretty quick," Loerch said that the motorcycle was "[n]ot even close" to being on its side when the front wheel of the motorcycle struck Miller's car. Loerch was thrown over the handlebars of his motorcycle into Miller's car. Miller testified that he was

unaware that he had been involved in a collision and drove away. But Miller soon returned to the scene after experiencing difficulties with steering, discovering the damage to the car, and consulting by telephone with his girl friend.

Loerch sustained a comminuted fracture of his nose and soft tissue injuries to his neck and back. Six days after the collision, Loerch reported feeling abdominal pain, and his physician detected that there had been some bleeding in his kidneys. Loerch also experienced headaches and episodes of memory loss.

On April 5, 2006, Loerch filed a lawsuit against Miller and his parents.[1] He alleged that Miller's negligence caused the collision and sought damages for physical and emotional injuries. In his answer, Miller denied liability and asserted comparative negligence.

At the pretrial conference on January 14, 2008, Miller admitted that he failed to yield the right-of-way. But he did not admit that he failed to stop and render assistance to Loerch following the collision. Rather, Miller expressed concern about testimony referring to the accident as a hit and run and asked for permission to introduce evidence that he received no citation for hit and run. The court reserved its ruling. Miller further moved to preclude Loerch from using

[1] Loerch sued Miller's parents under the family car doctrine.

the term "hit and run" on grounds that it was prejudicial. That motion was granted.

Loerch moved to restrict expert testimony by John Hunter to modifications of Loerch's motorcycle that (1) were illegal and (2) contributed to the collision. Miller objected, stating that Hunter intended to testify that the inadequate braking system and high handlebars of the motorcycle hindered Loerch's ability to avoid the collision. According to Hunter, the proper course of action was to "slow the bike as quick as you can, and if you can, steer to avoid if you've got the time to do that." In response, Loerch pointed out that the handlebars were legal, unlike the inadequate braking system, and argued that because motor vehicle administrative regulations established the standard of care, any legal modifications of Loerch's motorcycle, such as the high handlebars, should not be considered as evidence of negligence. The court reserved its ruling but granted the motion the next day, stating that Hunter could not "opine that [Loerch] was negligent for having any street-legal component or equipment on his motorcycle."

At trial on the same day, Loerch called Officer Bradley Hammermaster. Hammermaster testified that he received a call reporting the collision between Loerch and Miller and arrived on the scene within 10 minutes, at approximately 9:30 p.m. Hammermaster saw paramedics treating Loerch and noticed Loerch's motorcycle lying on its side. Miller was not at the scene, but he later

approached Hammermaster and identified himself as the driver of the other vehicle involved in the collision. At trial, Hammermaster reviewed photographs of Miller's car and testified that they accurately reflected the damage to the car he observed that day. Over Miller's objection, Hammermaster testified that Miller would have known that he had been involved in an accident. "There was certainly a significant impact, so he would be aware something had happened." Hammermaster also stated that the damage to the front tire would have caused it to go flat "immediately" and that this "would make quite a bit of noise, and you would have some—a sogginess or a deadness in your steering, because only one tire would really be steering."

Loerch also called David Haralson. Haralson testified that he followed Loerch up Belmont Avenue but lost sight of him when Loerch crested the hill. According to Haralson, after a few seconds he heard the sound of tires losing contact with the pavement. When Haralson reached the top of the hill he saw Loerch lying face down on the pavement in a pool of blood. He saw Loerch's motorcycle lying on its side about four to eight feet away and noticed that the front wheel was "bent pretty badly." Haralson did not see Miller's car, but as he was calling 911, an eyewitness approached him and told him that a "car . . . took off and . . . it was red." Miller made a hearsay objection, but the court allowed the testimony as an excited utterance. Haralson then repeated that the eyewitness described a "red vehicle . . . leaving the scene quickly."

Loerch testified at length about his distress upon being left in the street after the collision. Immediately after the impact, he said that he was "upset and in . . . a lot of pain and just really, really angry, because I can remember hearing a car leaving the scene and lying there face down in my own blood." Loerch also described his feelings of fear and confusion. "I was laying [sic] in a pool of blood, you know, my blood in the middle of a street in a very heavily populated area. . . . I couldn't get up. I couldn't do anything. I was afraid I was going to get run over." He further stated, "I haven't ever felt pain like this, and I haven't ever felt fear like this." When asked how much time passed before someone arrived on the scene, Loerch said, "I felt like I was out there by myself for a long, long time."

Miller testified that he was unaware that he had been involved in a collision with Loerch and that when he started turning left, he felt a "thump" as though he had run over a pothole or piece of concrete. He soon realized that the car was not steering properly, so he turned right at the next intersection. After driving a few more blocks, he stopped the car and discovered the damage to the front tire and front quarter panel of the car. Realizing that he had been in a collision, he called his girl friend. Upon her advice, Miller returned to the scene of the accident.

On cross-examination, Miller described the route he had taken after the loud "thump." Miller was then asked whether there had been any parking places

along that route. Over his objection, Miller said that he did not remember whether there were any parking places because he was "confused and flustered."

Hunter was called by Miller to reconstruct the accident. In his reconstruction, Hunter assumed that Miller had come to a full stop at the intersection and used a normal acceleration rate of 0.2 G. Hunter also assumed that the collision occurred near the centerline of Belmont Avenue and that Loerch's motorcycle was almost on its side before impact. Based on these assumptions, Hunter estimated that Miller had traveled 30 feet before the collision and that three seconds had elapsed from the time Miller entered the intersection until the time of the collision. Hunter stated that if Loerch had enough time to lay down the motorcycle, then he had enough time to avoid the collision by stopping. Hunter also testified extensively about the lack of braking controls on Loerch's motorcycle. Although he was not permitted to testify about the high handlebars, Hunter opined that the jockey side shifter, while legal, was unsafe.

In rebuttal, Loerch called Timothy Moebs to reconstruct the collision. Moebs assumed that Miller had made a "rolling" stop and used an acceleration factor of 0.25 G. Moebs placed the collision in the lane Loerch was traveling. Based on these assumptions, Moebs estimated that Miller had traveled 18 to 28 feet before the collision and that one and three-quarters to three seconds had

elapsed from the time Miller entered the intersection until the time of collision. Moebs further estimated Loerch's "perception response" time between one to three seconds.[2] According to Moebs, this amount of time was too short for Loerch to take evasive action.

At the end of trial, Loerch proposed instruction 14 based on the hit-and-run statute, RCW 46.52.020:

> A statute provides that the driver of a vehicle involved in an accident resulting in damage to the other vehicle or injury to the other person shall immediately stop his vehicle at the scene of the accident, or as close thereto as possible and forthwith return to, and in every event remain at, the scene of the accident. In the event of injury, the driver shall render reasonable assistance to the injured person, including carrying or making the arrangements for carrying the injured person to a physician or hospital for medical treatment if it is apparent that such treatment is necessary.

Miller objected to instruction 14 on grounds that the issue of hit and run was not involved in this case. The court gave the instruction because it related to Loerch's claim for emotional damages allegedly resulting from Miller's failure to stop and render assistance after the collision. The jury was also given two instructions regarding Miller's admission of liability and his claim for contributory negligence. Instruction 5 provided:

> The defendant admits that defendant was negligent, and that his negligence was a proximate cause of plaintiff's injuries.
>
> The defendant further admits that medical expenses incurred by the plaintiff were reasonable and necessary and

[2] Moebs defined "perception response time" as the time a driver has to react after perceiving that a vehicle has become an immediate hazard.

> related to the accident. The defendant denies the nature and extent of plaintiff's other claimed injuries and damages.
>
> The defendant claims as an affirmative defense that the plaintiff was contributorily negligent. The defendant claims that the plaintiff's negligence was a proximate cause, in whole or in part, of plaintiff's injuries and damages. The plaintiff denies these claims.

Similarly, instruction 10 stated:

> The negligence of the defendant has been established. The plaintiff has the burden of proving what injuries and damages were proximately caused by the defendant's negligence.
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> The claim of the defendant is an independent claim. On that claim the defendant has the burden of proving that the plaintiff was negligent in one of the ways claimed and that the negligence of the plaintiff was a proximate cause of the injury or damage.

Miller only took exception to instruction 14.

On January 25, 2008, the jury found that Loerch was not contributorily negligent and awarded him $137,000. Miller appeals.

Standard of Review

We review a trial court's exclusion of expert testimony and a trial court's evidentiary rulings for abuse of discretion.[3] A trial court's decision to provide a particular jury instruction is also reviewed for an abuse of discretion.[4]

Discussion

I. Exclusion of Expert Testimony

Miller argues that the trial court erred when it restricted Hunter's

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[3] City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004); Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994) (citing State v. Gould, 58 Wn. App. 175, 180, 791 P.2d 569 (1990)).

[4] Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

testimony to modifications of Loerch's motorcycle that were illegal and contributed to the collision. Specifically, Miller contests the exclusion of testimony in which Hunter would have explained how the high handlebars and side shifter, although both legal, made Loerch's motorcycle more difficult to steer and thus contributed to the collision.

Miller's argument fails because Washington case law and the emergency doctrine establish that the particular factual circumstances surrounding Loerch's attempt to evade the collision cannot give rise to contributory negligence. Our courts have addressed collisions involving similar factual circumstances and held:

> If . . . the first driver suddenly and without prior warning sees the other driver cross over into the first driver's lane and thus create an emergency situation which requires the first driver to take immediate evasive action, then if the time for taking such evasive action is too short to prevent the collision, the first driver as a matter of law cannot be held guilty of contributory negligence.[5]

Our courts have further held that under these circumstances "[c]ontributory negligence of the first driver in the illustration given cannot be determined by split-second computations of time and distance."[6]

For example, Division Three in Kilde v. Sorwak[7] examined an intersection

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[5] Boerner v. Estate of Lambert, 9 Wn. App. 145, 150, 510 P.2d 1157 (1973) (citing Tutewiler v. Shannon, 8 Wn.2d 23, 111 P.2d 215 (1941)).

[6] Boerner, 9 Wn. App. at 150 (citations omitted) (finding insufficient evidence of contributory negligence when the plaintiff driver had three seconds to take evasive action).

[7] 1 Wn. App. 742, 463 P.2d 265 (1970).

collision in which the defendant's pickup truck turned left into the path of the plaintiffs' car.[8] Drawing inferences in favor of the defendant, the court pointed out that the plaintiffs, when first observed by the defendant, were four seconds from the point of impact, which allowed the plaintiff driver about two seconds to react.[9] The court refused to "engage in split-second computation" to bar the plaintiffs' damages claim and held that the plaintiffs were not contributorily negligent.[10]

In this case, Miller turned left into Loerch's path, forcing Loerch to take immediate evasive action. The calculations provided by Hunter and Moebs show that Loerch did not have enough time to avoid the collision. Hunter calculated that three seconds had elapsed from the time Miller entered the intersection until the time of the collision, while Moebs estimated that one and three-quarters to three seconds had elapsed. Yet, Hunter maintained at trial that Loerch had sufficient time to avoid the accident.

> Q: Did [Loerch's] actions give him enough time, based on your experience as an accident reconstructionist, and an accident investigator, and a motorcycle rider, regardless of whether we're talking about quarters of a second, is this enough time for him to have avoided the accident?
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> A: In this crash, yes.

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[8] Kilde, 1 Wn. App. at 746-47.

[9] Kilde, 1 Wn. App. at 746-47. This calculation placed the plaintiffs' car 150 feet from the intersection and at a speed of 25 m.p.h.

[10] Kilde, 1 Wn. App. at 747-48.

We disagree. Following Kilde, split-second calculations of time cannot determine whether Loerch was contributorily negligent.

In addition, the emergency doctrine, which was included in the jury instructions, shields Loerch's decision to lay down his motorcycle.[11] Under this doctrine, a person who (1) is suddenly confronted by an emergency through no negligence of his or her own, (2) is compelled to decide instantly how to avoid injury, and (3) makes a choice that a reasonably careful person placed in the same position might make, is not negligent even though it is not the wisest choice.[12] Loerch satisfies these requirements. The evidence shows he faced an emergency situation created by Miller's failure to yield the right-of-way. According to both experts' calculations, Loerch only had seconds to take evasive action. Loerch further testified that he received training on laying down a motorcycle in safety courses, which demonstrates that his choice to do so was a reasonably careful one. Thus, Loerch is shielded by the emergency doctrine.

In sum, case law and the emergency doctrine establish that under the factual circumstances in this case, Loerch cannot be guilty of contributory negligence as a matter of law. The trial court properly excluded Hunter's testimony regarding modifications to Loerch's motorcycle that contributed to the

[11] Instruction 18 was based on the emergency doctrine. Miller did not take exception to this instruction.

[12] 6 Washington Practice: Washington pattern jury instructions: civil § 12.02, at 142 (5th ed. 2005).

collision.

II. Hit-and-Run Testimony and Instruction

Miller next argues that the trial court erred in admitting testimony related to Miller's duty to stop and render aid. Specifically, Miller refers to his answers to questions regarding places he could have stopped after the accident,[13] Hammermaster's statements about whether Miller would have been aware that he had been in a collision, and the hearsay testimony provided by Haralson that a red car left the scene. Such hit-and-run testimony, Miller contends, is irrelevant and prejudicial because he had already admitted his negligence.

To be admissible, evidence must be relevant.[14] Under ER 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[15] Even if relevant, however, evidence may still be excluded under ER 403 "if its probative value is substantially outweighed by the danger of unfair prejudice."[16] The trial court has wide discretion in applying ER 403.[17]

Here, Loerch sought damages for emotional injuries allegedly resulting

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[13] Miller did not object to four photographs taken by Loerch's wife that depicted places Miller could have parked. Miller only objected to one photograph on grounds of lack of foundation, which the court overruled.

[14] ER 402.

[15] ER 401.

[16] ER 403.

[17] Carson, 123 Wn.2d at 226.

from Miller's failure to stop and render aid. To demonstrate the extent of these injuries, Loerch testified in detail, without any objection from Miller, about the emotions he experienced when he was left at the scene of the accident. Loerch similarly elicited testimony by Miller, Hammermaster, and Haralson to support his claim for emotional damages. Contrary to Miller's contention, this testimony is relevant because Miller disputed the extent of Loerch's emotional injuries. Instruction 5 stated that Miller admitted that "medical expenses incurred by the plaintiff were reasonable and necessary and related to the accident" but denied "the nature and extent of plaintiff's other claimed injuries and damages."

Furthermore, although Miller admitted that he failed to yield the right-of-way, he never admitted that he failed to stop and render aid. At the pretrial conference, Miller argued that he had fulfilled the duty to stop and render aid because he had returned to the scene later.[18] At trial, Miller also argued that he never knew that he was in an accident until he saw the damage to the car. The fact that Miller offers these different arguments undermines his assertion that the contested hit-and-run testimony is irrelevant because he admitted his negligence. This admission only goes to Miller's driving—his failure to yield the right-of-way—and not to his failure to stop and return to the scene.[19]

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[18] Miller made the same argument in taking exception to the hit-and-run instruction.

[19] See State v. Perebeynos, 121 Wn. App. 189, 191, 87 P.3d 1216 (2004) ("The purpose of the hit-and-run statute is to assure that drivers stop and give

Thus, Miller's testimony on cross-examination, the testimony by Hammermaster about Miller's awareness of the impact, and the hearsay testimony provided by Haralson are probative on the issue of emotional injuries allegedly resulting from Miller's failure to stop and return to the scene. The danger of unfair prejudice does not exceed the probative value of this hit-and-run testimony given the trial court's limitation on use of the term "hit and run." The court did not err in admitting this testimony.

We similarly conclude that the court did not err in providing the hit-and-run instruction. Miller nonetheless asserts that by giving this instruction, the court submitted an issue to the jury which was not involved in the case under Thompson v. Groves.[20]

Thompson, however, is distinguishable. In that case, the plaintiffs were passengers in a car driven by Gary Schnee.[21] The plaintiffs were injured when Schnee rear-ended the car driven by the defendant.[22] At trial, the jury was instructed that the negligence, if any, on Schnee's part was not attributable to the plaintiffs and would not bar recovery for any injuries they received due to the defendant's negligence.[23] Yet the jury received instructions, over the plaintiffs'

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aid and information. It does not penalize . . . driving; it penalizes [the] failure to stop or return to the scene.").

[20] 68 Wn.2d 790, 415 P.2d 648 (1966).

[21] Thompson, 68 Wn.2d at 790-91.

[22] Thompson, 68 Wn.2d at 790-91.

[23] Thompson, 68 Wn.2d at 791.

objections, about the duties owed by Schnee.[24] Our Supreme Court reversed the judgment entered in the defendant's favor, reasoning that "the challenged instructions refer to Mr. Schnee's conduct, which is not in issue. . . . [T]he instructions were applicable neither to the issues nor to the evidence."[25]

Here, unlike in Thompson, Miller's conduct is in issue. As stated above, Miller admitted liability in failing to yield the right-of-way, not in failing to stop and render assistance to Loerch following the collision. Moreover, unlike in Thompson, the hit-and-run instruction is applicable to both the issue of Loerch's emotional damages and the substantial evidence he presented in support of this claim. The court explained:

> I made the decision to give the instruction because there was testimony from the plaintiff that he suffered mental or emotional distress as a result of his understanding or knowledge that the vehicle involved in the collision with him left the scene, and given that there's evidence from which a trier of fact could conclude that damages stemmed from Mr. Miller's leaving the scene, I felt that that was an item of negligence or alleged negligence that the jury needed to consider and weigh in the comparative fault, and that's why I included it in the set of instructions.

Accordingly, the court did not err in giving the hit-and-run instruction.

III. Attorney Fees

Loerch requests attorney fees under RAP 18.9 for a frivolous appeal. "An appeal is frivolous if there are no debatable issues upon which reasonable

[24] Thompson, 68 Wn.2d at 791.
[25] Thompson, 68 Wn.2d at 791.

minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal."[26] Because Miller's appeal is not frivolous, we decline to award attorney's fees.

Conclusion

Under the factual circumstances of this case, case law and the emergency doctrine establish that Loerch cannot be held contributorily negligent as a matter of law. Therefore, the trial court properly excluded Hunter's testimony regarding modifications that contributed to the collision. The trial court also did not err in allowing the hit-and-run testimony and instruction since Miller denied Loerch's claim for emotional injuries and never admitted his failure to stop and render aid.

Affirmed.

WE CONCUR:

[26] Eugster v. City of Spokane, 139 Wn. App. 21, 34, 156 P.3d 912 (2007).